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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF APPELLEES

The National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and The City of New York (collectively "the Local Governments") submit this brief *amici curiae* in support of the appellees. Each party to this suit has given the Local Governments written consent to the filing of this brief pursuant to Rule 37.3 of this

Court, and copies of their consents have been filed with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

This appeal involves First Amendment facial challenges to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1471-81 (to be codified at 47 U.S.C. §§ 534, 535) (the "1992 Cable Act"). Sections 4 and 5 set forth the conditions under which cable systems must carry the signals of local broadcast television stations. Among the issues before this Court is the proper First Amendment analysis for evaluating regulation of the cable industry. That issue directly concerns local governments, which have "primary" authority for cable regulation under the 1992 Cable Act. *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) ("1992 House Report").

Amici Curiae, who participated in the proceedings below, represent various governmental entities and officials involved in the regulation of cable television—

—The National Association of Telecommunications Officers and Advisors ("NATOA") is an unincorporated association composed primarily of local government employees and advisors responsible for the regulation of cable systems and other local telecommunications services. NATOA is affiliated with, and serves as an advisor to, the National League of Cities.

—The National League of Cities represents more than 17,000 cities and towns, the substantial majority of which franchise and regulate cable operators' use of public property.

—The United States Conference of Mayors represents the more than 950 mayors of cities with populations exceeding 30,000 residents. The majority of these mayors have cable television-related responsibilities.

—The City of New York has been involved in franchising and regulating cable systems since 1964. The City has in place ten franchises for cable television systems, which currently serve over one million households.

In exercising their responsibilities as trustees of public property, local governments have been negotiating franchise agreements with cable operators since the advent of cable television in the 1950's. Francise agreements specify certain of the conditions under which cable operators are allowed to utilize, and thereby commercially profit from, public property. Such agreements seek to ensure that cable operators use public resources for the purposes for which that use was authorized in the first instance—to make available a wide diversity of programming to the entire community. *See Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540, 1550 (7th Cir. 1989) (as public's "representative," local government is "duty-bound" to ensure that cable operators who occupy public property "make optimum use" of it, and that public is "accorded a range of programming"), *cert. denied*, 493 U.S. 1044 (1990).

Increasingly, however, cable operators have raised First Amendment challenges to the public interest obligations reflected in franchise agreements. Moreover, operators have brought First Amendment challenges to a number of provisions of both the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act") and the 1992 Cable Act that directly affect local governments' regulatory responsibility over cable television. *See Daniels Cablevision, Inc.* v. *United States*, —— F. Supp. ——, Civ. A. No. 92-2292, 1993 WL 393000 (D.D.C. Sept. 16, 1993), *appeal docketed*, No. 93-5290 (D.C. Cir. Sept. 28, 1993). Among the 1984 Cable Act and 1992 Cable Act provisions currently being challenged are those that authorize franchising authorities to negotiate requirements for public, educational, and governmental access channels; establish national standards for the

local and federal regulation of cable rates; clarify that the 1992 Cable Act does not prohibit municipal ownership of cable systems; and immunize cable franchising authorities from certain damage awards.

In adjudicating First Amendment challenges to cable regulation, the lower courts have adopted varying (and often conflicting) standards of analysis. The purpose of this brief is to set forth the Local Governments' views concerning the proper First Amendment standard for evaluating economic regulation of the cable television industry, such as the must-carry provisions of the 1992 Cable Act.

SUMMARY OF ARGUMENT

In *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), this Court declined to articulate the appropriate First Amendment analysis for analyzing cable regulation. The Court explained that the appropriate analysis could not be determined without a fuller development of the factual record, noting that the particular characteristics of the cable medium—its "uses of the public utility poles and rights-of-way"—may distinguish it from other media for First Amendment purposes. *Id.* at 495.

As the Court has observed, "[E]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *accord Preferred Communications*, 476 U.S. at 496 (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."). Moreover, as the three-judge Court below correctly recognized in declining to exercise jurisdiction over appellants' non-must-carry claims, the different communications media are not "governed by a single First Amendment standard." *Turner Broadcasting Sys.* v. *FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992). "In fact, standards vary within a single medium depending on the character of the disputed restriction." *Id.*

Any determination of the First Amendment standard to be applied to a particular cable regulation must take account of (1) the substantial benefits that local governments and the federal government confer upon the cable industry (including extensive, non-transient use of public rights-of-way) in order to facilitate the dissemination of a wide diversity of programming to the entire community; and (2) cable's "bottleneck" control over the programming that may be made available to that community. The First Amendment affords federal and local governments wide latitude in imposing conditions upon governmental benefits and in dealing with monopolistic conduct. *See Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

As this Court's decisions make clear, viewpoint-neutral structural regulations of cable (including the must-carry provisions of the 1992 Cable Act) should be subjected to a rational basis, and not strict scrutiny, review. Requirements that further the purposes for which cable operators are permitted to make substantial use of valuable public resources easily satisfy a rational basis standard.

Under any standard, however, the must-carry provisions embodied in the 1992 Cable Act are consistent with the First Amendment. They reflect the type of reasonable public interest regulation that should be imposed upon cable operators who, as Congress found, have both the incentive and the ability to stifle potential competition from other media. *See* 1992 House Report at 60. Indeed, before the federal government preempted this area, local governments themselves could—and did—negotiate franchise agreements that required cable operators to carry local broadcast signals. The First Amendment does not preclude local governments from conditioning access to public property upon compliance with viewpoint-neutral requirements (including must-carry requirements) which help ensure that (1) the public receives a diversity of programming; and (2) the maximum possible beneficial

use is made of public resources. Nor does the First Amendment preclude the federal government from imposing what amounts to uniform national guidelines for such requirements.

ARGUMENT

I. RATIONAL BASIS IS THE APPROPRIATE STANDARD OF REVIEW

A. Rational Basis Review Is Appropriate Given the Substantial Governmental Benefits Which Facilitate Cable's Commercial Dissemination of Programming

1. Appellants argue at length that, for First Amendment purposes, cable operators should be treated the same as newspaper publishers. However, cable operators do not merely seek freedom from governmental regulation of their programming services. Instead, they seek to obtain the right of unrestricted *government facilitation* of their private speech and commercial interests. As such, their status is critically different from that of newspaper publishers.

Unlike newspapers, cable relies for dissemination of its programming services upon the permanent physical occupation of governmental resources held in trust for the public. In order to gain access to paying subscribers, cable operators must make extensive, non-transient use of valuable public property. Cable wires and associated equipment must be hung from poles, housed in underground ducts, or otherwise placed in or across a public right-of-way. Furthermore, cable operators necessarily depend upon state and local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See generally Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The federal government also has adopted several laws and regulations that uniquely benefit the cable industry. Among other things, these provisions facilitate cable's access to the public right-of-way and to private property

owned by utilities and others. *See, e.g.*, 47 U.S.C. § 541 (a)(2) (rendering unenforceable private arrangements that seek to restrict cable system's use of public rights-of-way or easements); 47 U.S.C. § 224(b) (authorizing FCC to determine reasonable terms and conditions on which cable operator may require utility to provide access to that utility's poles and ducts).

Congress and the FCC also have benefited cable by imposing various limitations on the conditions that local governments may negotiate in cable franchise agreements. *See generally City of New York* v. *FCC*, 486 U.S. 57 (1988) (upholding FCC preemption of local cable technical standards); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) (striking down state restrictions on cable advertising as inconsistent with FCC regulations and federal copyright law); *ACLU* v. *FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (generally upholding FCC restrictions on state and local regulation of cable rates), *cert. denied*, 485 U.S. 959 (1988). The 1984 Cable Act itself places a cap on the amount of franchise fees that cable operators can be required to pay in exchange for utilizing public rights-of-way. *See* 47 U.S.C. § 542.

Similarly, to promote cable's growth and the wide availability of broadcast programming to cable subscribers, Congress has compelled copyright owners of programming broadcast over conventional television stations to license that programming to cable operators—on terms established solely by the federal government. *See* 17 U.S.C. § 111; *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983); 1992 House Report at 57. Neither broadcasters nor newspaper publishers enjoy any governmentally-mandated right to use and to profit from the copyrighted works they distribute.[1]

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[1] Appellants argue that the Court, in evaluating the constitutionality of the federal must-carry provisions, should disregard the substantial benefits that cable systems receive from local govern-

2. The First Amendment affords federal and local governments wide latitude in imposing conditions on the grant of benefits to private parties. For example, in *Regan*, this Court upheld against First Amendment challenges a statute that denied tax benefits to non-profit organizations engaged in lobbying. The Court in *Regan* ruled that restrictions on a federal subsidy are not "subject to strict scrutiny" where there is "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S. at 548-50. And, in *Rust*, 111 S. Ct. at 1776, this Court noted that "the existence of a Government 'subsidy,' in the form of Government-owned property," justifies government-imposed conditions on the subsidy, including restrictions on speech—unless those restrictions apply to speech within traditional public fora. As the Court in *Rust* also stated, "[W]ithin far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 1773.[2]

In *Federal Election Comm'n* v. *International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir.) (en banc), *cert. denied*, 113 S. Ct. 605 (1992), the U.S. Court of Appeals for the District of Columbia considered the con-

ments—such as use of public rights-of-way. That argument, however, rests upon a fundamental misconception of the must-carry provisions. Absent federal preemption of this area, a franchising authority could reasonably condition a cable operator's use of public property upon that operator's agreement not to deny local broadcast stations access to the cable system. The must-carry provisions of the 1992 Cable Act simply provide uniform, national standards for the carriage of local broadcast signals.

[2] The constitutionality of the statutory provisions at issue here presents a far easier case than did the constitutionality of the rule at issue in *Rust*. That rule prohibited recipients of federal family planning funds from advocating abortion as a method of family planning. In contrast, the cable regulations challenged by appellants constitute only structural economic regulations that are neither content- nor viewpoint-based.

stitutionality of a provision of the Federal Election Campaign Act ("FECA"). That provision granted persons access to public lists of the contributors of political committees, but prohibited persons from using those lists to solicit contributions or to advance a commercial purpose. The D.C. Circuit provided the following analysis of *Rust* and *Regan*:

> In those cases the Court apparently held that *so long as the purpose of a statute is not to "suppress*[] . . . *dangerous ideas," it is constitutional if it has a rational basis, see Rust v. Sullivan,* 111 S.Ct. at 1771-76 (no mention of an "important" or "substantial" government interest); [*Regan*], 461 U.S. at 544-46 (same).

969 F.2d at 1116 (citations omitted) (emphasis added). The FECA's restriction on speech constituted a reasonable viewpoint-neutral condition on a governmental grant; accordingly, the Court of Appeals found that restriction to be consistent with the First Amendment.[3]

As this authority demonstrates, the government may condition the benefits it bestows upon the cable industry (such as the use of public resources), as long as those conditions are viewpoint-neutral and have a rational basis. The must-carry provisions of the 1992 Cable Act plainly satisfy that standard. Those provisions are content-neutral economic regulation. As the three-judge Court correctly concluded, "[T]he must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any message." *Turner Broadcasting Sys.* v. *FCC*, 819 F. Supp. 32, 40 (D.D.C.), *prob. juris. noted*, 114 S. Ct. 38 (1993). Moreover, the

[3] The Court of Appeals in *International Funding* noted that there may be a "conflict" between *Regan* and *Rust*, on the one hand, and *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (requiring intermediate scrutiny in a government benefits case), on the other hand. The Court of Appeals found no need to resolve that possible conflict. 969 F.2d at 1116.

provisions are rationally related to the legitimate governmental interests explicitly set forth in Section 2 of the 1992 Cable Act. *See* 1992 Cable Act, sec. 2, 106 Stat. at 1460-64.[4]

B. Rational Basis Review Is Also Appropriate Given Cable's Bottleneck Control over the Programming That May Be Disseminated to Community Residents

The decisions in *Associated Press* and its progeny also make clear that content-neutral structural regulation of a natural monopoly does not implicate the First Amendment. As the Court noted in *Associated Press,* "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 326 U.S. at 20. The Court in *Associated Press* thus held that the government, without violating the First Amendment, could use its antitrust laws to regulate the Associated Press' monopolistic practices. *Id.*

Similarly, in *FCC* v. *National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978), this Court upheld against a First Amendment challenge the FCC's ban on the number of media outlets that newspapers may own. The Court found the FCC's cross-ownership rule to be a "reasonable means of promoting the public interest in

[4] Reliance on a rational basis test in the circumstances here is also consistent with traditional forum analysis. Where nonpublic fora are involved (such as in the case of cable's use of a public right-of-way or easement), the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983). The determination of what is reasonable in such a context is properly focused on the reasonableness of regulating an industry receiving the privilege of comprehensive use of special public property. *See Preferred Communications,* 476 U.S. at 494-95.

diversified mass communications." *Id.* at 802. And, in *Committee for an Indep. P-I* v. *Hearst Corp.,* 704 F.2d 467 (9th Cir.), *cert. denied,* 464 U.S. 892 (1983), the Ninth Circuit upheld against a First Amendment challenge the Newspaper Preservation Act as an "economic regulation which has the intent of promoting and aiding the press." 704 F.2d at 483. In each of these cases, the courts evaluated the challenged governmental regulation without any hint of heightened scrutiny—notwithstanding that the regulation involved the print media.

The *Associated Press* doctrine applies equally to the must-carry provisions embodied in the 1992 Cable Act. Although a cable system may offer a large number of channels, there is typically only one system in each market. A cable system rarely faces competition from a second cable system. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 8, 51-52 (1991) ("1991 Senate Report"); 1992 Cable Act, sec. 2(a)(2), 106 Stat. at 1460; *Chicago Cable,* 879 F.2d at 1550 ("Unlike the traditional forms of print media, a cable programmer enjoys a virtual monopoly over its area, without the threat of an alternative provider."). A community served by only one cable system effectively has access only to the speech selected by that one editor. That one editor determines which of several voices will be heard by cable subscribers.[5]

[5] Appellants claim that cable is not characterized by any "physical scarcity" that would preclude multiple cable operators in a community. However, at least one federal court, upon the development of a full evidentiary record concerning a particular community, has found to the contrary. *See Telesat Cablevision, Inc.* v. *City of Riviera Beach,* 773 F. Supp. 383, 396 (S.D. Fla. 1991); *see also Omega Satellite Prods.* v. *City of Indianapolis,* 694 F.2d 119, 125 (7th Cir. 1982). As Congress noted,

> "Common sense dictates that the number of entities that can tear up the streets or use existing poles and ducts is very limited physically * * * If everyone sought to have a cable operation, the result would be a wall of wires creating chaos

Under *Associated Press*, structural regulations that prevent cable operators from exploiting their "gateway" or "bottleneck" facilities (1992 House Report at 57) to diminish the diversity of programming do not violate the First Amendment. The must-carry provisions of the 1992 Cable Act constitute "economic regulations designed to promote competition and a diversity of voices in communications services," *Associated Press*, 326 U.S. at 59. As such, they do not offend the First Amendment.

II. THERE IS NO PROPER BASIS FOR APPELLANTS' INVOCATION OF STRICT SCRUTINY

Appellants' strict scrutiny argument rests on two claims: (1) the must-carry provisions allegedly interfere with the

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or interference akin to that which existed in the early days of broadcasting."

1991 Senate Report at 51 (ellipsis in original) (footnote omitted) (quoting Testimony of Henry Geller, "Cable TV Consumer Protection Act of 1989," p. 9).

Appellants also claim that the must-carry provisions preclude cable operators from offering programming they wish to offer. This is simply incorrect. The must-carry rules do not prohibit carriage of any programming. A cable operator's decision not to carry certain services is in fact the product of a number of factors unrelated to must-carry. *See* Time Warner Complaint ¶¶ 29-30 (filed Nov. 5, 1992), *Turner Broadcasting Sys.* v. *FCC*, 819 F. Supp. 32 (D.D.C.) (No. 92-2494), *prob. juris. noted*, 114 S. Ct. 38 (1993).

Furthermore, any limitation on the number of channels offered by a cable operator results from that operator's own economic and marketing decisions, because the cable operator is technologically able to offer as many channels as it wishes. Structural regulation does not infringe First Amendment rights simply because it may impose some greater expense on a cable operator. *See Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991) (injury to cable operator's profit is not the same as injury to its First Amendment rights); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 49 n.97 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[I]n the absence of a showing of economic harm bordering on censorship, a diminution of profits does not itself present a First Amendment problem.").

"editorial discretion" of cable *operators* (not cable programmers) by compelling them to carry speech they would otherwise not carry; and (2) these provisions discriminate among media by placing restrictions only on cable television. Neither of these theories warrants strict scrutiny under the First Amendment.

This Court, in *Leathers* v. *Medlock*, 111 S. Ct. 1438 (1991), held that cable operators could be taxed differently than newspapers. *Id.* at 1447. The Court in *Leathers* thus made clear that discrimination among media or categories of speakers "does not implicate the First Amendment"—unless it "is directed at, or presents the danger of suppressing, particular ideas." *Id.*; *see also Regan*, 461 U.S. at 548-49. The Court in *Leathers* rejected the position of the dissent there, which is essentially the same position advocated by appellants in this case: that the state must offer an interest in the regulation that is "sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle." 111 S. Ct. at 1450 (Marshall, J., dissenting).

Furthermore, any alleged interference with "editorial discretion" does not warrant strict First Amendment scrutiny—unless the government is penalizing or deterring the expression of particular views, *see, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (striking down statute granting political candidates right of reply in newspaper that expressed particular viewpoint (criticism) with respect to them), or forcing the speakers to publicly "affirm" views to which they object. *See generally PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). Because the must-carry provisions are not viewpoint-based and do not force affirmation of particular views, strict scrutiny is not triggered.

CONCLUSION

For the reasons stated above, the Court should make clear that viewpoint-neutral economic regulation of cable is subject to rational basis review; structural regulation that furthers the purposes for which cable is authorized to use public resources does not offend the First Amendment. The Local Governments urge the Court to affirm the order and judgment of the three-judge District Court upholding the constitutionality of the must-carry provisions of the 1992 Cable Act.

Respectfully submitted,

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